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Scholars say Reagan may restrict NSC testimony on Hill

By Damon Thompson
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President Reagan has a strong case for invoking executive privilege to keep his advisers from testifying about arms shipments to Iran, according to constitutional scholars.

"I think the president has the right to invoke executive privilege and he has it for the members of the National Security Council," Walter Berns, a professor at Georgetown University and director of the Institute for Educational Affairs, said yesterday.

"I would expect it would stand up if it should go before the courts," Mr. Berns said.

"Congress certainly has a role in the conduct of foreign policy and they have a right to be informed," said Robert A. Goldwin, a resident scholar at the American Enterprise Institute. "But the fact that the national security adviser is not confirmed by the Senate seems to indicate that he's the president's man."

The doctrine of executive privilege, which holds that internal advisory communications of the executive branch are protected from public disclosure, is not expressly mentioned in the Constitution. But that protection has been informally practiced over the years.

George Washington, the nation's first president, claimed he could "exercise a discretion" over what materials under his supervision he could be compelled to disclose to another branch of government.

Washington once refused a House request to supply lawmakers with working papers developed in negotiations between the United States and England. Succeeding presidents historically have followed suit, contending the power to keep executive secrets is implied in the constitutional separation of powers.

Former President Dwight Eisenhower was the first to coin the term "executive privilege," invoking it as a defense against congressional in-

vestigations launched by Sen. Joseph McCarthy.

But it was Richard Nixon who caused the greatest stir with assertions of executive privilege, particularly during the Watergate years. Mr. Nixon tried at one point to apply the doctrine to former White House aides to keep them from testifying before a Senate subcommittee, but he eventually backed down.

In 1974, the Supreme Court rejected Mr. Nixon's claim of executive privilege when he sought to withhold tapes of Watergate-related conversations recorded in his office.

However, the ruling recognized the right of executive privilege on other matters, saying such claims

would be entitled to "the utmost deference" by the courts if foreign policy or military secrets were involved.

The Reagan administration has invoked executive privilege on numerous occasions, from former Interior Secretary James Watt's refusal to provide information to Congress in 1981 to the White House's recent refusal to provide documents regarding the confirmation of William Rehnquist as Chief Justice of the Supreme Court.

In nearly every situation, however, the administration has backed down and struck a compromise with Congress. Many scholars said they saw the groundwork being laid for a

similar compromise in the Iran situation, under which Mr. Reagan has agreed to allow CIA Director William Casey to formally testify before Congress while making National Security Adviser John Poindexter available only for an informal briefing.

"I would think that the best way to avoid a constitutional conflict where the lines are not very clear would be to hear what Mr. Casey has to say," Mr. Goldwin said.

"If they feel then they haven't obtained the information that's necessary for carrying out their duties, that's a problem and it could strengthen their hand," said Mr. Goldwin.

"But if they're looking for a fight and don't care what they do to constitutional principles, they could certainly have one."